COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. **SUPERIOR COURT DEPARTMENT**
DOCKET NO. [redacted]

COMMONWEALTH

v.

[redacted]

THE DEPARTMENT OF PUBLIC HEALTH'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO QUASH

INTRODUCTION

Pursuant to Mass. R. Crim. P. 17, the Massachusetts Department of Public Health ("DPH") respectfully submits this memorandum of law in support of its motion to quash the subpoena, dated March 30, 2012, that was served upon Dr. Linda Han, Director of DPH's Bureau of Laboratory Sciences. In the subpoena, the defendant seeks (1) all performance evaluations for a former DPH employee who is not a witness in this case; and (2) all documents relating to an isolated incident that occurred at the DPH laboratory *six years* after the drugs at issue in this case were tested and returned to the police. The subpoena should be quashed because the documents the defendant seeks are privileged and confidential, and the defendant has failed to demonstrate that they are relevant, admissible or necessary to his defense. Commonwealth v. Lampron, 441 Mass. 265, 268 (2004).

First, the documents have no relevance to the cocaine seized in this case, any person who is expected to testify at trial, test results that will be introduced into evidence, or any other live issue in this matter. To the contrary, DPH tested the cocaine in this case in 2005 and immediately returned the drugs to the police. Yet the subpoena seeks all documents relating to

the investigation into an isolated incident that occurred at the DPH laboratory in June 2011. That investigation revealed that the June 2011 incident was a discreet event and that there was no evidence to suggest that any samples or results (either in 2011 or otherwise) had been impacted. Likewise, the documents the defendant seeks do not pertain to a witness in this case; rather, the performance evaluations and investigative materials all pertain to an individual who the parties know will *not* testify. Also, the defendant already has a DPH document confirming that, prior to the June 2011 incident, the individual had no personnel issues.

Second, the documents are subject to several privileges. These include the attorney-client privilege, the work-product doctrine, and several exemptions to the state public records law. Weighing these privileges against the irrelevant nature of the documents, the subpoena should be quashed.

DPH will have the documents available, should the Court wish to examine them *in camera* before ruling on the motion to quash.

BACKGROUND

This case is before this Court on a retrial. In 2005, [redacted] (the "defendant") was indicted for trafficking in cocaine, possessing a Class E substance with the intent to distribute, and with committing two drug offenses in a school zone. Commonwealth v. [redacted] (2010) (unpublished) (Exh. B hereto). In September 2005, DPH's William A. Hinton State Laboratory Institute (the "DPH Lab") tested the cocaine that had been seized in this case. One chemist, Elizabeth O'Brien, conducted the original testing and another chemist, "A.D.", performed a second set of tests to confirm the original analyst's test results.[1] In October 2005, a week after the tests were completed, the cocaine was returned to the Brockton police department. See Exh. C, Receipt for Return of Drug Samples, dated October 6, 2005.

[1] To prevent an unwarranted invasion of privacy, the former employee is referred to as "A.D."

On March 28, 2007, the defendant was convicted of possession of a Class E substance, trafficking in cocaine, and committing a drug offense in a school zone. The defendant was subsequently granted a new trial. [redacted] at *3 (Exh. B hereto).

On or before March 30, 2012, the defendant's attorney apparently received a copy of a letter, dated February 21, 2012, to District Attorney Michael Morrissey from Dr. Linda Han, the Director of DPH's Bureau of Laboratory Sciences (the "February 2012 Letter"). The letter discussed a potential breach in recording protocols that occurred at the DPH Lab on June 14, 2011. The letter explained that, based on the security checks in place at the laboratory, the incident was an isolated, one-time event and there was no evidence to suggest that any samples or results (either in 2011 or otherwise) had been impacted. The letter further made it clear that all the samples from the single-batch incident were from Norfolk County. The letter also stated that prior to the incident, A.D. had had no personnel issues in her eight years at the DPH Lab.

Nevertheless, on March 30, 2012, the defendant subpoenaed three categories of records from Dr. Linda Han. See Exh. A. DPH has produced documents responsive to the first category, leaving the second and third categories in dispute. In Category 2 of the subpoena, the defendant seeks all of the performance evaluations in A.D.'s personnel file.[2] Category 3 is even broader; it seeks:

> Each and every document (as defined in Mass. R. Crim. P. 14, including, without limitation, correspondence, notes and memoranda) in your possession, custody or control which evidences, substantiates, refers or relates in any way to the investigation of a breach of protocol at the William A. Hinton State Laboratory Institute discovered in June, 2011 and as disclosed in a letter from Linda Han to Norfolk District Attorney Michael W. Morrissey, dated February 21, 2012.

[2] While Category 2 originally requested A.D.'s entire personnel file, on April 9, 2012, defense counsel agreed to limit the request to all of the performance evaluations in the file.

Id. The subpoena that Dr. Han received contained no motion, affidavit or explanation of why the desired documents have a "rational tendency to prove [or disprove] an issue" in this case. Commonwealth v. Lampron, 441 Mass. 265, 269-70 (2004). See also Exh. A.

ARGUMENT

I. The Defendant Has Failed To Make the Necessary Showing Required Under Mass. R. Crim. P. 17.

The subpoena should be quashed under Mass. R. Crim. P. 17(a)(2). In Commonwealth v. Lampron, 441 Mass. 265 (2004), the Massachusetts Supreme Judicial Court (the "SJC") created specific standards which must be satisfied in order to obtain third-party records in a criminal case. The party seeking the records must establish four elements:

> (1) that the documents are evidentiary and relevant;
>
> (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;
>
> (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
>
> (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. at 269. "A judge hearing a Rule 17(a)(2) motion must evaluate whether the Lampron requirements of relevance, admissibility, necessity, and specificity have been met, or whether the defendant's motion constitutes a disguised attempt to undermine Rule 14 by launching an improper 'fishing expedition.'" Commonwealth v. Mitchell, 444 Mass. 786, 792 (2005). See also Commonwealth v. Dwyer, 448 Mass. 122, 140 (2006) (the Lampron factors "*must* be satisfied before any documents of any kind may be summonsed from any third party prior to trial") (emphasis in original).

To satisfy the first Lampron requirement, the defendant must show that the evidence he seeks has a rational tendency to prove or disprove an issue in the case. Lampron, 441 Mass. at

269-70. "Rule 17(a)(2) is not to be used as a means to explore the availability of potential evidence or otherwise to subvert the pre-trial discovery provisions of Rule 14." Mitchell, 444 Mass. at 791. The defendant therefore must make this showing in order to "prevent unnecessary harassment of a complainant and other witnesses caused by burdensome, frivolous, or otherwise improper discovery requests." Commonwealth v. Lam, 444 Mass. 224, 229 (2005). As for the third and fourth requirements,

> both serve as a reminder that Rule 17(a)(2) is *not* a discovery tool, ... and that the limited purpose of Rule 17(a)(2) is to authorize a court "to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials."

Dwyer, 448 Mass. at 142 (emphasis in original) (quoting United States v. Nixon, 418 U.S. 683, 698–99 (1974)).

The defendant is seeking DPH's confidential and privileged documents, see infra at Section II, and therefore likely could meet the second Lampron standard. The defendant cannot, however, satisfy the first, third or fourth Lampron requirements.

A. Category 2: The Performance Evaluations of a Non-Witness.

A.D.'s performance evaluations are irrelevant to this case. She will not be a witness at trial and her test results will not be introduced into evidence. There is no information in the evaluations concerning any lapses in laboratory protocols or any other disciplinary matters. Monroe Aff. In fact, prior to the 2011 incident, A.D. had no negative personnel issues whatsoever. Further, the 2005 tests performed in this case are not mentioned in the evaluations (no test results are discussed). Monroe Aff. Consequently, the defendant cannot demonstrate "'a specific, good faith reason' for believing that the requested personnel records are 'relevant to a material issue in the criminal proceedings and could be of real benefit'" to his defense. Commonwealth v. Donovan, 2001 WL 1029619, *3 (Mass. Super. Ct. 2001) (quoting

Commonwealth v. Wanis, 426 Mass. 639, 644-45 (1998)) (Exh. D hereto). "Given the defendant's failure to make [the necessary Lampron] showing, disclosure of the requested records is not warranted." Id. at *4 (quashing subpoena for corrections officers' personnel records where defendant failed to show that the documents had a rational tendency to prove or disprove an issue in his case).

Because the defendant cannot meet the "Lampron requirements of relevance, admissibility, necessity, and specificity...," Mitchell, 444 Mass. at 792, Category 2 of the subpoena should be quashed.

B. Category 3: All Documents Concerning an Internal Investigation Into a Discreet Event in June 2011.

Category 3 likewise should be quashed. In that category, the defendant asks for:

> Each and every document (as defined in Mass. R. Crim. P. 14, including, without limitation, correspondence, notes and memoranda) in your possession, custody or control which evidences, substantiates, refers or relates in any way to the investigation of a breach of protocol at the William A. Hinton State Laboratory Institute discovered in June, 2011 and as disclosed in a letter from Linda Han to Norfolk District Attorney Michael W. Morrissey, dated February 21, 2012.

Exh. A. This category should be quashed because the defendant cannot satisfy "the Lampron requirements of relevance, admissibility, necessity, and specificity...." Mitchell, 444 Mass. at 792.

As an initial matter, the defendant cannot demonstrate that he has a "good faith, specific, and reasonable basis for believing that" documents concerning the investigation into the June 2011 incident "contain[] exculpatory evidence that might be a real benefit to the defense." Commonwealth v. Rodriguez, 426 Mass. 647, 648 (1998). The February 2012 Letter forms the defendant's only basis for requesting DPH's investigative documents. The letter, however, makes clear that (1) the June 2011 incident was an isolated event which was quickly discovered;

(2) prior to the incident, A.D. had had no personnel issues; and (3) there was no evidence to suggest that any samples or results (either in 2011 or otherwise) had been impacted. Thus, the defendant simply has no "good faith, specific, and reasonable basis for believing that" DPH's investigative documents would be helpful to his defense. Id.

Even looking beyond good faith, the defendant cannot demonstrate that DPH's investigative documents have a "rational tendency to prove [or disprove] an issue" in this case. Lampron, 441 Mass. at 269-70. Rodriguez is instructive. The defendant in that case claimed that when he was arrested, the police assaulted him with dangerous weapons and violated his civil rights. 426 Mass. at 649. An investigation was conducted and, as part of his criminal case, the defendant requested all documents related to the internal affairs investigation into his complaints. Id.

The SJC found that the defendant was entitled to statements that the "police department's internal affairs division obtained from percipient witnesses, including the alleged victims." Id. But the Court reached the opposite conclusion with respect to records of events that occurred *after* the defendant's arrest. Id. at 649-50. The Court explained:

> The defendant has not shown, pursuant to the standards we established in our Wanis opinion, that events after the commission of the alleged crimes are either relevant to, or likely to be helpful in resolving, the question of his guilt. The defendant has thus failed to demonstrate any basis for the production of statements concerning postarrest events.

Id. at 650.

So too here. All of the documents in Category 3 concern an incident that took place *six years* after DPH tested the drugs at issue and returned them to the Brockton police. See Exh. A. That incident was unrelated to the defendant's test results (or any test results before or after June 14, 2011). Like the defendant in Rodriguez, the defendant here simply cannot establish that the

June 2011 incident is "either relevant to, or likely to be helpful in resolving, the question of his guilt." Rodriguez, 426 Mass. at 650.

Similarly, in Commonwealth v. Cruz, the Massachusetts Appeals Court ruled that the trial judge "properly barred" the defendant "from impeaching the prosecution's two medical experts with evidence of their alleged isolated mistakes or inconsistencies in wholly unrelated prior cases." 53 Mass. App. Ct. 393, 407 (2001). The Appeals Court held that "[s]uch evidence was, under well-established principles, either legally irrelevant to the reliability of the experts' testimony here or, if marginally relevant, was excludable in the judge's discretion as an unduly time-consuming, collateral and confusing diversion." Id. at 407-08.

Here, of course, A.D. is not a witness, and there is no evidence that the integrity of *any* of her samples or test results were ever compromised. Thus, even more so than the documents in Cruz, DPH's investigative documents are "legally irrelevant." Id. See also Rodriguez, 426 Mass. at 649-50.

Nor can the defendant satisfy the Lampron requirements of admissibility and specificity. There is no basis for admitting documents concerning an individual who is not a witness and an investigation that took place six years after the drugs at issue here were tested. See, e.g., Cruz, 53 Mass. App. Ct. at 407-08; Commonwealth v. White, 2006 WL 3703233, *2 (Mass. App. Ct. 2006) ("A mistake by an expert witness in another case is not ordinarily admissible.") (Exh. E hereto). Similarly, the broad reach of Category 3 – it asks for all documents that relate in any way to the investigation into the June 2011 incident – demonstrates that this is nothing more than a "general 'fishing expedition.'" Lampron, 441 Mass. at 269.

In short, Category 3 of the subpoena should be quashed. Id. See also Rodriguez, 426 Mass. at 649-50.

II. Multiple Protections and Privileges Also Warrant Quashing the Subpoena.

The subpoena also should be quashed on the grounds that it is unreasonable and oppressive. See Mass. R. Crim. P. 17(a)(2). As the SJC explained, a motion to quash

> plac[es] before a judge the lawfulness of the command to produce and other issues, such as its reasonableness and whether, balancing policy considerations against a defendant's right of confrontation, the subpoena should be honored, restricted or modified in some way, or quashed....

Rodriguez, 426 Mass. at 648. See also Commonwealth v. Caceres, 63 Mass. App. Ct. 747, 751 (2005) ("Legitimate objections brought pursuant to a motion to quash may be wide ranging and may properly include objections to the general 'lawfulness of the command to produce and other issues.') (quoting Rodriguez, 426 Mass. at 648). Furthermore, "[i]n considering whether compliance [with a subpoena] would be unreasonable or oppressive," the court must consider the "nature of the documents being subpoenaed," including whether they are "either privileged as a matter of statute or confidential as a matter of custom." Commonwealth v. Bougas, 2000 WL 576398, *2 (Mass. Super. Ct. 2000) (citing Rodriguez, 426 Mass. at 647) (Exh. F hereto).

Here, the subpoena is unreasonable and oppressive because it seeks documents that are subject to numerous privileges and protections. These include the attorney-client privilege, the work-product doctrine, and several exemptions to the state public records law. Weighing these privileges against the irrelevant nature of the documents, the subpoena should be quashed.

A. The Subpoena Calls for Attorney-Client Communications and Attorney Work Product.

In Suffolk Construction Co., Inc. v. Division of Capital Asset Management, the SJC held explicitly that confidential communications between governmental entities or officers and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the attorney-client privilege and are thus exempt from examination by third parties. 449 Mass. 444, 450 (2007). This attorney-client privilege still exists in full force despite the

Massachusetts Legislature's passage of the public records law, G.L. c. 66, § 10. "Nothing in the language or history of the public records law, or in our prior decisions, leads us to conclude that the legislature intended the public records law to abrogate the [attorney-client] privilege for those subject to the statute." Suffolk Construction, 449 Mass. at 446.

The Court explained that it would be unwise to remove the protections of the attorney-client privilege from government agencies and officials. Id. The removal of the attorney-client privilege would, according to the Court,

> severely inhibit the ability of government officials to obtain quality legal advice essential to the faithful discharge of their duties, place public entities at an unfair disadvantage vis-à-vis private parties with whom they transact business and for whom the attorney-client privilege is all but inviolable, and impede the public's strong interest in the fair and effective administration of justice.

Id.

Many of the documents responsive to the subpoena were made for the purpose of legal advice, and as a result, should be protected by the attorney-client privilege. **Monroe Aff.** See also Matter of John Doe Grand Jury Investigation, 408 Mass. 480, 482 (1990) (the attorney-client privilege prevents third parties from gaining access to any confidential communications between a client and its attorney for the purpose of obtaining legal advice).

These and additional documents also contain attorney work product. Monroe Aff. For instance, documents concerning the investigation into the June 2011 incident contain information compiled by the Deputy General Counsel for DPH, as well as requests for advice and discussions of legal negotiations. Monroe Aff. Further, many of the attorney-work product documents in the investigative files contain the "mental impressions, conclusions, opinions, or legal theories" of DPH attorneys, which must not be disclosed even if a showing of need for "ordinary" work product could be made (it could not). See In re San Juan Dupont Hotel Plaza Fire Litig., 859

F.2d 1007, 1014-15 (1st Cir. 1988) (discussing difference between "ordinary" and "opinion" work product and higher level of protection accorded the latter); In re Grand Jury Subpoena (Legal Sacs. Center), 615 F. Supp. 958, 962-63 (D. Mass. 1985) (at a minimum, requesting party must make a "far stronger showing of necessity and unavailability by other means" than is required for ordinary – i.e., fact – work product) (quoting Upjohn Co. v. United States, 449 U.S. 383, 401-02 (1981)).

These documents should not be released, as confidential details of an attorney's representation of a client must remain confidential, whether that client is a private party or a governmental agency. See, e.g., Suffolk Construction, 449 Mass. at 446 (as to attorney-client communications); In re San Juan Dupont Hotel, 859 F.2d at 1014-15 (as to the work-product doctrine).

B. The Personnel Information Exemption Shields All of the Documents.

The documents in both Category 2 and Category 3 are protected by the personnel matters exemption to the public records statute, G.L. c. 4, § 7, cl. 26(c). This exemption, which shields "personnel . . . files or information" from disclosure, was designed to protect the precise categories of documents at issue here: performance evaluations and disciplinary documentation. See Wakefield Teachers Ass'n v. School Committee of Wakefield, 431 Mass. 792, 798 (2000) (holding that "employee work evaluations" and "disciplinary documentation" are among the "core categories of personnel information" subject to protection under the exemption).

For instance, the investigation into the June 2011 incident at the DPH Lab focused on one individual, to determine whether she should be disciplined for actions that potentially violated laboratory protocol. The SJC has held that shielding such disciplinary investigations from disclosure protects the "government's ability to function effectively as an employer." Wakefield,

431 Mass. at 802. Absent the exemption, employees will be more reluctant to report potential incidents for fear of public embarrassment for the agency, their colleagues or themselves. Employees also will be far more hesitant to cooperate in investigations if they know that their statements may become public. As the SJC stated:

> It would not be unreasonable to conclude that disclosure of [a] sensitive and careful investigation and analysis would make the same kind of investigation and analysis difficult, if not impossible, in the future.... [For example,] [w]ere the [disciplined] teacher concerned that his cooperation would result in public disclosure, we question whether his cooperation would have been as forthcoming.

Id. The SJC's reasoning applies here with full force: to protect DPH's ability to investigate internal incidents, the investigative documents should be shielded from disclosure.

In sum, both the investigative documents and A.D.'s performance evaluations fall squarely within the personnel information exemption. See G.L. c. 4, § 7, cl. 26(c); Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 438 (1983) (personnel files or information are absolutely exempt from mandatory disclosure as public records where the files or information in question are of a personal nature and relate to a particular individual). Weighing the documents' lack of relevance in this case against the importance of this exemption, the documents should not be produced. See, e.g., Bougas, 2000 WL 576398 at *2 (in evaluating whether a subpoena is oppressive or unreasonable, court should consider whether the documents are "either privileged as a matter of statute or confidential as a matter of custom") (Exh. F hereto).

C. Production Would Constitute an Unwarranted Invasion of Privacy.

The subpoena also should be quashed because the documents in Categories 2 and 3 fall within the privacy exemption to the Massachusetts public records law, G.L. c. 4, § 7, cl. 26(c). Under that clause, the Legislature created an exemption for "any other materials or data relating

to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." Id. In order to apply the privacy exemption, the court is required to balance the claimed invasion of privacy against the interest in the disclosure of the information. Globe Newspaper Co. v. Police Commissioner of Boston, 419 Mass. 852, 858 (1995).

As previously discussed, the performance evaluations and investigative files bear no relation to the drugs at issue or any other live issue at trial. By contrast, they contain sensitive and personal details about a former laboratory employee. The individual was investigated for a breach of protocol in the DPH Lab and after the investigation, she separated from DPH. That investigation necessarily discusses the employee's conduct, candidly and in detail. At least one document also contains very personal details about events that occurred in the employee's family years after the drugs at issue were tested.

The privacy interests of the individual are greatest where "disclosure would publicize 'intimate details' of a 'highly personal nature.'" Attorney General v. Assistant Commissioner of Real Property Dept. of Boston, 380 Mass. 623, 625-26 (1980). That is precisely the case here. See, e.g., Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 168 (D.C.D.C 1976) ("The disclosure of information concerning an employee's promotion prospects, lack of promotion prospects, job performance evaluations, and personal preferences and goals, and the reasons for an employee's termination ... would constitute a substantial invasion of ... employees' personal privacy."). The documents therefore should not be released.

D. The Investigative Documents Fall Within the Security Measures Exemption.

The Security Measures exemption of the public records law exempts:

> records including, but not limited to, blue prints, plans, policies, procedures and schematic drawings, which relate to internal layout and

> structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons, buildings, structures, facilities, utilities, transportation or other infrastructure located within the Commonwealth, the disclosure of which, in the reasonable judgment of the custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety.

G.L. c. 4, § 7, cl. 26(n). If not held back from public disclosure under any of the preceding privileges or exemptions, the investigative documents should be exempted under the security measures exemption.

The DPH Lab's primary function is to perform testing to protect the public health. This includes testing for foodborne disease pathogens, such as salmonella and E coli; vaccine-preventable diseases like whooping cough, measles, and mumps; chemical terrorism agents like mustard gas; and bioterrorism agents, such as anthrax. The laboratory also performs numerous other types of testing, from screening for childhood lead poisoning to analyzing mosquito-transmitted diseases.

Certain investigative documents in Category 3 describe portions of the DPH Lab, such as security features and the placement of surveillance cameras. This type of information should not be released to the public, as it could make the laboratory more vulnerable than it otherwise would be. Balancing the irrelevance of the investigative documents against the importance of this exemption, Category 3 of the subpoena should be quashed.

CONCLUSION

For the reasons set forth above, DPH respectfully requests that this Court quash the defendant's subpoena in its entirety.

Respectfully Submitted
For the Massachusetts Department of Public Health,

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Dated: April 10, 2012

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Department of Public Health's Memorandum of Law in Support of Its Motion to Quash was served upon each of the parties listed below, on April 10, 2012, by depositing the copy in the office depository for collection and delivery by first-class mail, postage pre-paid, addressed to them as follows:

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